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No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (see Pet. 11a–20a). The Decision and Order of the National Labor Relations Board (R. 7–22)[1] are reported at 122 NLRB 1289.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1960 (Pet. 10a). The petition for a writ of certiorari was filed on August 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the Joint Appendix filed with the court below.

QUESTIONS PRESENTED

1. Whether the Board correctly held that an employer and union violated Sections 8(a) (1), (2) and 8(b)(1)(A) of the National Labor Relations Act, respectively, by recognizing the union as the exclusive representative of all employees in a specified bargaining unit at a time when the union had not been designated by a majority of the employees as the bargaining representative.

2. Whether in the circumstances set forth in Question No. 1 the Board acted within the permissible limits of its discretion (a) in ordering the employer to withdraw and withhold recognition from the union as the exclusive bargaining representative of its employees, and the union to cease acting as such representative, unless and until the union has won a Board-conducted election, and (b) in further ordering the employer and the union to cease giving effect to a collective bargaining agreement executed shortly after the illegal recognition of the union as the exclusive bargaining representative even though the union may then have attained majority status.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A to the petition (Pet. 1a).

STATEMENT

A. THE BOARD'S FINDING AND CONCLUSIONS

The Board found that the Company [2] violated Section 8(a)(1) and (2) of the Act by recognizing, and executing and maintaining a contract with, the International Ladies' Garment Workers' Union, as the exclusive bargaining representative of its employees at a time when the Union did not represent a majority of these employees. The Board also found that the Union violated Section 8(b)(1)(A) by executing and maintaining the same contract. The facts upon which these findings rest may be summarized as follows:

In October, 1956, the Union began to organize the Company's employees (R. 9, 36, 141–146). Between October, 1956 and September, 1957, the Union continued its organizational efforts, securing from employees authorization cards which designated the Union as the employees' bargaining representative (R. 36, 141–146). As of August 30, 1957, the critical date in this proceeding, the Union had not received authorization cards from a majority of the employees (R. 11–12).[3]

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[2] Bernhard-Altmann Texas Corporation is a Delaware corporation with its principal place of business in San Antonio, Texas, where it is engaged in the manufacture of knitwear for interstate commerce (R. 35–36).

[3] The Board resolved the factual issue concerning majority status by finding that as of August 30, 1957, the Union did not represent a majority of the Company's employees. The Company payroll on that date included 357 employees, of whom 280 were within the bargaining unit (R. 129, 65, 71, 90, 100–102). In addition, the unit may have included some or all of another 120 employees laid off in the preceding month (R. 135, 61–63, 74). The Union had received authorizations from 158 employ-

On July 29, 1957, in an action unrelated to the Union's organizational campaign, certain employees struck in protest against a wage reduction in the Topping Department (R. 9, 37, 89). The Union, which represented most of the strikers, attempted to compose the differences. On August 30, 1957, following several meetings devoted to negotiation, the Union and Company signed a "memorandum of understanding" whereby the Company recognized the Union as exclusive bargaining agent for all production and shipping employees (R. 9, 37, 103–104). This contract provided among other things for an immediate termination of the strike, a wage increase, the checkoff of union dues, arbitration of disputes and the drafting of a formal agreement containing the terms of this memorandum (R. 9, 37, 103–104). Prior to the signing of the contract, the Company did not request an examination of the signed authorization cards, nor did the Union volunteer these cards (R. 9, 64, 138, 139), which would have shown that the Union did not represent a majority of the employees (J.A. 11–12; 103). Furthermore, at the time of the signing of the August 30 memorandum, the Company did not make the payroll records available, nor did it check the authorization cards against the payroll records subsequent to August 30 (R. 139).

On October 10, 1957, the Company and Union signed a formal collective bargaining agreement which

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ees, including 88 of the laid-off employees (R. 135, 141). If those 88 are excluded, the Union represented only 70 out of a unit of 280; even if they are all included, the Union represented only 158 out of 368 or more.

incorporated the terms of the "memorandum of understanding" (R. 9–10, 105, 72). This agreement reaffirmed recognition of the Union as sole bargaining agent for the Company's nonsupervisory production and shipping workers with certain specific exclusions (R. 9–10, 106–107).[4]

On the foregoing facts, the Board concluded that the Company, by recognizing the Union as exclusive bargaining representative of the employees at a time when the Union lacked majority status, extended unlawful support to the Union in violation of Section 8(a)(2) of the Act, and interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 to choose, or to refrain from choosing, a bargaining representative, in violation of Section 8(a)(1) of the Act (R. 15). The Board, one member dissenting, further concluded that the Union, by acting as exclusive bargaining representative at such a time, likewise restrained and coerced the employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act (R. 15–16, 22–27).

B. THE BOARD'S ORDER

The Board ordered the Company to cease and desist from supporting the Union and recognizing it as the exclusive bargaining representative of the employees

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[4] The unit description conforms to the unit in the "memorandum of understanding" except for the specificity as to exclusion. Excluded in the October 10 agreement are mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truckdrivers, engineers, maintenance men, and janitors (R. 106).

in the specified unit, and to withhold recognition until the Union demonstrated its majority status pursuant to a Board-conducted election. The Union was ordered to cease and desist from acting as exclusive representative until its majority was shown by the election. The Board's order (R. 17–22) further directed the Company and the Union to cease and desist from giving effect to the "memorandum of understanding" or the contract of October 10, 1957, which had recognized the Union as the exclusive bargaining representative of the employees in the specified unit.[5] Finally, the order directed both parties to post notices.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, speaking through Mr. Justice Burton (with Judge Fahy dissenting), affirmed the Board's findings as supported by substantial evidence on the record considered as a whole and enforced the Board's order (Pet. 11a–22a).

ARGUMENT

The decision below, for the reasons fully stated in Mr. Justice Burton's opinion (Pet. 15a–20a), is correct, does not conflict with any other court of appeals decision, and presents no issue warranting further review by this Court.

1. The crux of petitioner's case is that the decision below is inconsistent with "the principles of law" enunciated by this Court in *National Labor Relations*

[5] The Board's order, however, did not require the Company to vary or abandon any term or condition of employment established in the performance of the agreement (R. 18).

Board v. *Drivers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274. But as the court below pointed out, "In the *Curtis Bros.* case the issue was not whether the recognition of the minority union * * * was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A)" (Pet. 19a). This Court had held in *Curtis Bros.* that picketing by a minority union to achieve recognition as the employees' exclusive bargaining representative did not fall within the scope of Section 8(b)(1)(A). In reaching this conclusion, the Court had relied on the statutory protection accorded to the right to strike, including picketing, except where the statute specifically provided otherwise; the preclusion of any authority in the Board to regulate such picketing under Section 8(b)(1)(A), by implication from the specific limitations on the right to picket enacted in Section 8(b)(4); and the legislative history which negated any intent to vest in the Board authority to deal with peaceful picketing under Section 8(b)(1)(A). None of these considerations applies, however, to the execution of an agreement granting recognition to a minority union as the exclusive bargaining representative of all the employees in a specified unit, as is the situation in the present case. Indeed, it is fair to say, we think, that in *Curtis* the Court subsumed that the object of the picketing, *i.e.*, recognition of the minority union if consummated, would have been violative of the Act. See 362 U.S. at 280. Otherwise there would have been little occasion to determine the legality of the means used by the union to achieve that objective. Cf. *Local*

Lodge No. 1424 v. *National Labor Relations Board*, 362 U.S. 411, 413–414. This view of *Curtis Bros.* is borne out by the command of section 9(a) of the statute itself that only a representative designated by a majority of the employees in an appropriate bargaining unit may serve as the exclusive bargaining representative of all the employees. Thus, *Curtis Bros.* does not furnish support for petitioner's attack on the decision below.[6]

Petitioner's fears (Pet. 16–21) that the decision below will discourage collective bargaining because "[i]t prevents employees and unions from bargaining without risking either unfair labor practice charges or the delay involved in Board-conducted elections" (Pet. 21) are insubstantial. An employer remains free to recognize and bargain with a union as the exclusive representative of his employees upon satisfactory proof that a majority of the employees have designated it as their representative. "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8. However, in the present case, there was no attempt by either Company or Union to determine whether the Union did in fact have majority status. The Company neither requested an examination of the authorization cards, nor did the Union volunteer the cards. The Company made no attempt

[6] Petitioner's reliance on the Board's decision in *Miami Copper Co.*, 92 NLRB 322, is similarly misplaced. That case, like *Curtis Bros.*, dealt with the applicability of Section 8(b)(1)(A) to union strike action to compel an employer "through economic pressure * * * to invade the statutory rights of his employees * * *." 92 NLRB at 340.

to make its payroll records available, nor did it ever check the authorization cards against the payroll records. In these circumstances, to permit the parties to rely on nothing more than an alleged belief that majority status existed is to render meaningless the statutory command that exclusive recognition may only be accorded to the representative designated by a majority of the employees.

2. Equally insubstantial for purposes of certiorari is petitioner's attack upon the Board's order (Pet. 25–27). The Board properly set aside the contract of October 10, 1957, incorporating the terms of the "memorandum of understanding" of August 30, 1957, which unlawfully had extended exclusive recognition to the Union (*supra*, p. 6), because, as the court below correctly pointed out (Pet. 15a, n. 3), "The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant." Changes in a union's majority status attributable to unfair labor practices do not affect the Board's power to restore the *status quo ante* (cf. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 703–705; *Joy Silk Mills Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 744, certiorari denied, 341 U.S. 914), for, the "subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement" (*Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, 414).[7]

[7] It is assumed that this general statement of law is still valid when there is no question of the bar of the statute of limitations as there was in the *Local Lodge No. 1424* case.

The further provision of the Board's order directing the employer to withhold recognition from the Union as the exclusive bargaining representative of its employees, and the Union to cease acting as such representative unless and until it has "demonstrated its exclusive majority representative status pursuant to a Board-conducted election" (R. 20) fully comports with the principles enunciated by this Court in *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 463.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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